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No. 80-2102

In the Supreme Court of the United States

OCTOBER TERM, 1980

SHEILA RENDELL-BAKER,
PETITIONER,

v.

SANDRA KOHN, ET AL.,
RESPONDENTS;

WAYNE KLUG, ET AL.,
PETITIONERS,

v.

NEW PERSPECTIVES SCHOOL, INC., ET AL.,
RESPONDENTS.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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I

QUESTION PRESENTED

Is the Public Function Doctrine of State Action Applicable or Appropriate to a Private School Because It Provides Educational Services to Special Needs Children at Public Expense?

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Statement of the Case

This Brief in Opposition is filed on behalf of the respondent *New Perspectives School, Inc.* and the individual members of the School's Board of Directors who were sued in their individual and official capacities. For all purposes, respondents will be referred to collectively.

The two cases which petitioners seek to have reviewed involve claims by former staff members of the New Perspectives School, Inc. Petitioners' contention below was that, in each case, they were discharged based upon exercise of their First Amendment rights and without due process. The United States Court of Appeals for the First Circuit, after consolidating the two cases because the issues presented were so closely related,[1] held that respondents, in discharging petitioners, did not act "under color of state law" and entered appropriate orders dismissing the cases.[2]

For purposes of this Court's consideration of the petition for a writ of certiorari, respondents rely upon and incorporate by reference the Court of Appeals' statement of the case. 641 F. 2d at 16-21.

Reasons for Denying the Writ

I. The Public Function Doctrine Is Not Applicable or Appropriate to This Case.

Petitioners do not ask for review of the First Circuit's holding in this case on the grounds that the lower court incorrectly analyzed this Court's holdings in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961), *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972) and *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974). Their claim is that the First

[1] Petitioners here raise no issue independently relevant to one or the other case, and respondents will treat the issues raised in the same fashion. Presumably, any issue peculiar to the *Rendell-Baker* matter only was satisfactorily disposed of by the lower court. *Rendell-Baker* v. *Kohn*, and *Klug* v. *New Perspectives School, Inc.*, 641 F. 2d 14, 27-28 (1st Cir. 1981). (The First Circuit's opinion will be cited hereafter as *Klug*).

[2] The U.S. District Court's decision in *Rendell-Baker* was affirmed, while the *Klug* matter was reversed and remanded with directions that judgment be entered dismissing the complaint.

Circuit, though reading the *Burton-Moose Lodge-Jackson* line of cases correctly and consistently with other circuits which have addressed the problem, failed to apply the appropriate doctrinal framework to these circumstances. The premise upon which they seek review here is that this is a case of State delegation to respondents of a "public function" so closely associated with the State, so "traditionally exclusively reserved to the State"[3] that respondents must assume the constitutional obligations of the State. From this premise, petitioners conclude that respondents become a "public entity", not for all purposes, but only "in connection with activities directly related to the manner in which it performs that delegated function", including dismissal of its teachers. Petitioners' Brief, pp. 20-21.

The petition for a writ of certiorari should be denied because this Court's public function doctrine ought not to be applied to these circumstances. The doctrine has always been a severly circumscribed one, made more so in recent years. Indeed, this Court has already declined to include within the scope of the public function doctrine the particular function petitioners seek to place within its ambit, namely secondary education. Moreover, the notion that the public function doctrine, when applied, may permissibly result in a kind of "limited public function" application has never been adopted by this Court for the very good reason that it it impossible to set those limits and is wholly inconsistent with the doctrine itself. Finally, the public function doctrine is concededly not susceptible of definition and an unsatisfactory test that ought not to be expanded.

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[3] *Jackson*, 419 U.S. at 352.

A. *The Public Function Doctrine Has Been Limited to a Narrow Range of Activities Under Unusual Circumstances.*

Petitioners' theory of state action is premised upon the idea that the State has wholly delegated to respondents a "public function". They do not contest, as the First Circuit held, that there is not "a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself". *Jackson*, 419 U.S. at 351. Nor do they contest their failure to meet *Burton's* "symbiotic relationship" test, a relationship between State and private entity "so intertwined that the State will be held responsible for conduct with which it had no direct connection". *Downs* v. *Sawtelle*, 574 F. 2d 1, 9 (1st Cir. 1978). Rather, they propose that precisely because the state has contracted with respondents to discharge, in part, its responsibility to provide special education to its special needs children, respondents are necessarily performing a "public function" at least "in connection with activities directly related to the manner in which it performs that delegated function". Petitioners' Brief, pp. 20-21. While this novel approach has some surface appeal, it wholly ignores the fact that it has never been applied in the circumstances present here.

Largely because the public function doctrine is so amorphous and so capable of subjective application, it has always been severely circumscribed. The doctrine was first established in *Smith* v. *Allwright*, 321 U.S. 649 (1944), *Marsh* v. *Alabama*, 326 U.S. 501 (1946) and *Terry* v. *Adams*, 345 U.S. 461 (1953). At the time, it appeared to mean that if a private entity acted like the State, it would be treated like it at least for purposes of the Fourteenth Amendment.[4] From its inception,

[4] In *Marsh*, this Court held that the first amendment rights of one distributing religious literature applied to the privately owned streets of a company town, emphasizing that the company had treated the streets as public and had not restricted access to

the theory was restricted to a few select activities: maintenance of a company town, *Marsh*; conduct of party nominating procedures, *Smith*; conduct of elections for public office, *Terry*; provisions for parks, *Evans* v. *Newton*, 328 U.S. 296 (1966);[5] and private shopping centers so long as the activity (labor picketing) was related to the purpose for which there was public access. *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968).[6]

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them. While this Court never used the term, what seemed to be at work was "a kind of public easement based on estoppel". *Klug*, 641 F. 2d at 24-25, fn. 20.

[5] It should be noted that it is not at all clear that it was the governmental character of the provision of parks which formed the basis for the Court's decision in *Newton*. In *Newton*, the Court was presented with a unique fact situation. In its opinion, the Court emphasized that for decades prior to institution of the suit, the City had totally maintained the "whites only" park as a public facility, and found that, even though just prior to suit, private parties had replaced the City as trustee of the park, the City still exercised total control over and maintenance of the park. Indeed, this Court has stated that: "We think *Newton* rests on a finding of ordinary state action under extraordinary circumstances. The Court's opinion [in *Newton*] emphasizes that the record showed 'no change in the municipal maintenance and concern over this facility', after the transfer of title to private trustees. That transfer had not been shown to have eliminated the actual involvement of the City in the daily maintenance and care of the park". *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 159, fn. 8 (1978).

[6] As will be fully discussed, *infra*, *Logan Valley* is no longer good law, having been overruled by *Lloyd Corporation* v. *Tanner*, 407 U.S. 551 (1972) and *Hudgens* v. *N.L.R.B.*, 424 U.S. 507 (1976).

Lower courts have applied the theory in only two other areas: A federal district court in Alabama extended *Marsh* and *Newton* to cemeteries (*Terry* v. *Elmwood Cemetery*, 307 F. Supp. 369 (D. Ala. 1969)) and a number of lower federal courts have applied the theory to the unique properties of the National Collegiate Athletic Association. *Parish* v. *N.C.A.A.*, 506 F. 2d 1028 (5th Cir. 1975); *Howard University* v. *N.C.A.A.*, 510 F. 2d 213 (D.C. Cir. 1975); *Associated Students, Inc.* v. *N.C.A.A.*, 493 F. 2d 251 (9th Cir.

Jackson v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974), signalled this Court's view that the public function doctrine was a limited one, susceptible to quite circumscribed application. In *Jackson*, where beneficiaries of a monopolistic private utility service sought due process protections before service shut-downs, this Court expressly limited the doctrine to those cases where the private entity exercised "powers traditionally exclusively reserved to the state". 419 U.S. at 351. This Court, characterizing the public function "limited line of cases" as eliciting criteria "not susceptible of definition and form[ing] an unsatisfactory test",[7] expressly rejected any expansion of the precedent "into a broad principle that all business 'affected with the public interest' are state actors in all their actions". 419 U.S. at 353.

As a viable test of state action, the public function doctrine has continued its eclipse ever since *Jackson*. In *Hudgens* v. *N.L.R.B.*, 424 U.S. 507 (1976), the Court curtailed the doctrine's application to free expression on private property and expressly overruled the *Logan Valley* case in doing so.

1974); *Brockton* v. *N.C.A.A.*, 366 F. Supp. 1152 (D. Mass. 1973). For a comprehensive survey see *Cronin*, "Private Hospitals That Receive Public Funds Under The Hill-Burton Program: The State Action Implications", Vol. 12, No. 3, New England Law Review 525 (1977); *Nolte*, "State Action After *Jackson* v. *Metropolitan Edison Co.*: Analytical Framework for a Restrictive Doctrine", 81 Dickinson Law Review 315 (1977); *Note*, *State Action and the Public Function Doctrine: Are There Really Public Functions?* 13, University of Richmond Law Review 579 (1977). See, for example, lower federal court cases refusing to apply the doctrine to mortuaries and hospitals: *Watkins* v. *Mercy Medical Center*, 520 F. 2d 854 (9th Cir. 1975); *Scott* v. *Eversole Mortuary*, 522 F. 2d 1110 (9th Cir. 1975); *Schlein* v. *Milford Hospital*, 561 F. 2d 427 (2nd Cir. 1977).

[7] *Jackson*, 419 U.S. at 353, citing with approval the language of *Nebbia* v. *New York*, 291 U.S. 502, 536 (1934) which rejected a substantive due process claim on the basis of the vagaries of terms such as "affected with a public interest" and "clothed with a public use".

Hudgens affirmed that the doctrine had little application except in unusual circumstances such as *Marsh's* streets of a company town and *Smith's* party nominating procedures. The Court adopted Justice Black's long-held view that the public function doctrine applied only to where the entity "took on all the attributes of a town" and apparently to nothing else. *Marsh*, 326 U.S. at 502.

Two years later, when this Court confronted the "public function" of dispute resolution in *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 158 (1978), the doctrine's application was again rejected, the Court reiterating that the *Marsh* and *Smith* cases, unlike the case before it, had "in common the feature of exclusivity". 436 U.S. at 159.

Taking *Marsh*, *Jackson*, *Hudgens* and *Flagg Bros.* together, the circumscription of the doctrine is harsh and literal. Only where the delegated function has been traditionally *and* exclusively reserved to the State will the doctrine be considered. Since such a scenario is rare the doctrine will be infrequently applied.[8] "While many functions have been traditionally performed by governments, very few have been exclusively reserved to the State". *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 158 (1978).

B. *Neither Education Nor Special Education Fall Within the Ambit of the Doctrine.*

While it may indeed be true that education may be one of those areas "which have been administered with a greater degree of exclusivity"[9] than was *Flagg Bros.'* dispute resolution function, it is not of a degree to give rise to State action.[10]

[8] For example, *Jackson's* majority suggested that the case might be different had Pennsylvania delegated the eminent domain function, a power "traditionally associated with sovereignty", and unquestionably within the State's exclusive domain. *Jackson*, 419 U.S. at 353.

[9] *Flagg Bros.*, 436 U.S. at 163.

[10] *Flagg Bros.* expressly declined to express a view on this point.

Education "has never been a state monopoly in this country, even at the primary and secondary levels". *Powe* v. *Miles*, 407 F. 2d 73, 79 (2d Cir. 1968). As the *Jackson* court stated, this Court has long since rejected the application of the public function doctrine to education:

> . . . "It is difficult to imagine a regulated activity more essential or more 'clothed with the public interest' than the maintenance of schools, yet we stated in *Evans* v. *Newton*, 382 U.S. 296, 300, 86 S. Ct. 486, 489, 15 L. Ed. 2d 373 (1966):
>
> > 'The range of government activities is broad and varied, and the fact that government has engaged in a particular activity does not necessarily mean that an individual entrepreneur or manager of the same kind of undertaking suffers the same constitutional inhibitions. While a State may not segregate public schools so as to exclude one or more religious groups, those sects may maintain their own parochial educational systems' " *Jackson*, 419 U.S. at 353, fn. 9.

Moreover, and despite petitioners' assertions to the contrary, there is no fundamental distinction in principle between the Commonwealth's scheme providing public school education and the more recent scheme creating publicly supported special education. Massachusetts has taken upon itself the responsibility of providing a sufficient number of public schools for all its children. These residents and their families are not only assured but required to obtain an education. The State has also taken upon itself the responsibility of providing a publicly supported education for students with special needs. Compare 71 M.G.L., §1 with 71B M.G.L., §§2, 3. But neither obligation creates the expectation or the requirement

that the State assume *exclusive* responsibility.[11] It goes without saying that children in the Commonwealth may go to private schools to fulfill their statutory obligation. So too may children with special needs—at their own expense and *not* within the statutory framework of Chapter 766.

Respondents, like other private and parochial schools are, an important part of the educational system in this Commonwealth. They aid the State in discharging its statutory responsibility to provide compulsory education to all children. Yet to draw a line of public function application so as to include New Perspectives School and exclude other traditional private and parochial schools has no rational basis and only serves to highlight the weakness of the doctrine itself. Creation of a publicly supported education for students with special needs did not transform the private provider into a state actor any more than creation of a public school system transformed the traditional private or parochial school into a state actor.

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[11] Petitioners argue that statutory creation of a right to special education creates an expectation *and* entitlement to such a State supported service, with attendant constitutional obligations which cannot be delegated and are just as worthy of "recognition and fulfillment" as traditional and exclusive public functions. Petitioners' Brief, pp. 34-35, fn. 14. The assertion, however, ignores the reality that it is the tradition and exclusivity tests that must be met. Moreover, when the state creates an entitlement, it is the *State* which has the right to define the expectations surrounding that entitlement. This Court should give great deference to the Commonwealth's failure to afford teachers in private special education programs *any* of the procedural rights afforded all public school teachers. *Bishop* v. *Wood*, 426 U.S. 341 (1976); *Arnett* v. *Kennedy*, 416 U.S. 134 (1974); *Board of Regents* v. *Roth*, 408 U.S. 564 (1972). Finally, throughout much of their argument, but particularly in their footnote 14 and at pages 52-59, petitioners suggest an analysis which might be appropriate if the question of whether they were denied due process were at issue here. This question cannot even be addressed, however, unless it is found that respondent school acted under color of state law when it dismissed petitioners.

Even if special education is seen as having distinctive qualities more closely identifiable with a "public function" than education by private or parochial schools, such a function still fails to meet the tradition and exclusivity tests. The mere existence as well as the provisions of Chapter 766 establish that special needs education in the Commonwealth has never been "traditionally associated with sovereignty". *Jackson*, 419 U.S. at 353. Indeed, it is precisely because public schools had *not* traditionally educated special needs children that Chapter 766 was enacted.[12]

Secondly, special education is not the exclusive domain of the State. A special needs educational plan devised for a child is "subject to the consent of the parent or guardian affected thereby" M.G.L., Ch. 71B, §4. If a child's parents do not agree with the educational plan devised by the State, they are free to provide their child, at their own expense, with an alternative educational program.[13] Alternatively, they may decide to keep their child in a regular public school setting or to opt for a public school special needs program not recommended by the school committee. Thus, by statutory definition and practical effect, special needs education is a jointly public and private function and cannot be said to be within the State's exclusive domain.

Finally, recognizing that localities not only did not have the exclusive facilities for special needs education but often did not have any such facilities, the Massachusetts legislature provided that the localities could contract with private schools

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[12] As the First Circuit stated, "[I]t is only recently that public school systems have assumed any responsibility for children with special needs; until a few years ago such children were routinely excluded from public schools". 641 F.2d at 26.

[13] There is also an elaborate administrative process for ironing out differences between parents and schools over recommended choices since there is a fundamental tension between the child's needs and the fiscal and educational capacity of the school system to meet those needs.

such as respondents. See M.G.L. Chapter 71B, §5. The legislature's goal in this regard was to ensure quality special education regardless of public availability. By so doing, it cannot be said to have thereby implicitly expanded the traditional constitutional constraints of the public school system upon every private school that accepted a special needs child. Were this the case, "each of the various kinds of regulations to which the school is subject would apply as well to a private institution which contracted with the state to educate one student or to conduct one small program in return for small amounts of funds". *Klug*, 641 F. 2d at 25.

C. *The Public Function Doctrine Cannot Be Applied To Render a Private Entity's Conduct Public for Some Purposes and Private for Others.*

Petitioners' assertion that application of the doctrine to a private school like respondents' is permissive because it will apply only "in connection with activities directly related to the manner in which it performs that delegated function"[14] is wholly without merit. This Court, in all its operative opinions in the area, has always applied an "either-or" test: either the private actor is a state actor *for all purposes* or a private actor *for all purposes*. See *Smith*, *Marsh*, *Burton*, *Moose Lodge*, *Jackson* and *Hudgens*, *all supra*. This is so for the very obvious reason that the Fourteenth Amendment has not and cannot be so glibly bifurcated. It was precisely this approach of applying the public function doctrine depending upon the relationship of the activity to the public function that resulted in the express overturning of *Logan Valley*. Because there was room to distinguish the labor picketing in *Logan Valley* from the anti-war demonstration in *Lloyd* on the grounds that the former was related to the purpose for which the shopping center was open to the public while the latter was not, *Hudgens* ex-

[14] Petitioners' Brief, pp. 20-21.

pressly disposed of *Logan Valley*. See *Hudgens*, 424 U.S. particularly at 518 *et seq*. The rationale of *Hudgens* is controlling here. Just as the content of the speech in the shopping center cases could not transform the shopping centers into state actors, the content of the teachers' speech here cannot change respondent into a state actor.[16] To distinguish, as petitioners urge, between teacher criticism of educational policy and teacher complaints about inadequate parking facilities (the former transforming respondent to a state actor while the latter does not),[17] is to engage in precisely the subjective value judgments that the public function doctrine rejects. Thus, for example, petitioners presumably would not argue that anti-war speech by teachers in the classroom is protected, as this form of expression bears no direct relationship to the special education function. In this light, the "direct relationship" approach to the public function doctrine is no more than a guise for the claim that one form of expression is more worthy of protection than another.[18] But either the First and Fourteenth Amendments apply to this case or they do not: "Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content". *Police Dept. of Chicago* v. *Mosley*, 408 U.S. 92, 95 (1972).[19]

[16] As *Hudgens* aptly asserted, the First and Fourteenth Amendments would not permit "control of speech within such a center to depend upon the speech's content". 424 U.S. at 520.

[17] Petitioners' Brief, p. 21.

[18] The First Circuit did recognize a distinction when the public function concept was asserted by beneficiaries for whom services are provided since "the school's action *towards them*", may be construed as taken "under color of" state law. 641 F. 2d at 26. This approach is, in the last analysis, more properly within the *Jackson* nexus analysis. Were this language to be read as drawing a line for application of the public function analysis, respondent would respectfully disagree with both this statement and the First Circuit's footnoted references to cases which hint at a lesser state action standard where claims of discrimination rather than due process are alleged. 641 F. 2d at 26, fn. 21.

[19] Cited with approval in *Hudgens*, 424 U.S. at 520.

In summary, there is no reason in precedent or principle to extend the public function doctrine to this case. Respondents have attempted to demonstrate the dangers of adopting petitioners' more expansive approach. Yet no better articulation of these pitfalls can be found than Mr. Justice Harlan's presciently applicable dissenting opinion in *Evans* v. *Newton*:

> "More serious than the absence of any firm doctrinal support for this theory of state action are its potentialities for the future. Its failing as a principle of decision in the realm of Fourteenth Amendment concerns can be shown by comparing—among other examples that might be drawn from the still unfolding sweep of governmental functions—the 'public function' of privately established schools with that of privately owned parks. Like parks, the purpose schools serve is important to the public. Like parks, private control exists, but there is also a very strong tradition of public control in this field. Like parks, schools may be available to almost anyone of one race or religion but to no others. Like parks, there are normally alternatives for those shut out but there may also be inconveniences and disadvantages caused by the restriction. Like parks, the extent of school intimacy varies greatly depending on the size and character of the institution.
>
> "For all the resemblance, the majority assumes that its decision leaves unaffected the traditional view that the Fourteenth Amendment does not compel private schools to adapt their admission policies to its requirements, but that such matters are left to the States acting within constitutional bounds. I find it difficult, however, to avoid the conclusion that this decision opens the door to reversal of these basic constitutional concepts, and, at least in logic, jeopardizes the existence of denominationally restricted schools while making of every college entrance rejection letter a potential Fourteenth Amendment question.

"While this process of analogy might be spun out to reach privately owned orphanages, libraries, garbage collection companies, detective agencies, and a host of other functions commonly regarded as nongovernmental though parallelling fields of governmental activity, the example of schools is, I think, sufficient to indicate the pervasive potentialities of this "public function" theory of state action. *It substitutes for the comparatively clear and concrete tests of state action a catch-phrase approach as vague and amorphous as it is far-reaching. It dispenses with the sound and careful principles of past decisions in this realm. And it carries the seeds of transferring to federal authority vast areas of concern whose regulation has wisely been left by the Constitution to the States."* *Evans* v. *Newton*, 382 U.S. at 321-2, Harlan, J., dissenting (emphasis added).

II. There Is No Conflict Between the Decision of the First Circuit and the Decisions of Other Circuit Courts.

Petitioners rely upon two Circuit Court decisions, *Perez* v. *Sugarman*, 499 F. 2d 761 (2d Cir. 1974), and *Ginn* v. *Matthews*, 533 F. 2d 477 (9th Cir., 1976), to support their contention that the First Circuit's application of the public function theory of state action is in conflict with the treatment accorded that theory by the Second and Ninth Circuits.[20] But a careful reading of the three cases makes it clear that there is no conflict among the Circuits.

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[20] Petitioners also assert a conflict between the First Circuit decision and a decision from the Southern District of New York, *Ross* v. *Allen*, No. 80 Cir. 3422 (RWS) (S.D.N.Y., filed May 6, 1981). Since a conflict between a District Court opinion and a Circuit Court opinion cannot be used to justify this Court's intervention and since the *Ross* Court relies for its result almost solely on *Perez* v. *Sugarman*, the Second Circuit decision which petitioners contend is in conflict with the First Circuit, respondents will discuss only the alleged conflicts between the Circuit Court opinions.

There is no conflict between the First Circuit's opinion in this case and the Second Circuit's opinion in *Perez* v. *Sugarman*, 499 F. 2d 761 (2 Cir. 1974). In *Perez*, the plaintiff challenged New York State's detention of her children in a private child care institution, pursuant to a New York statute. The State had taken legal custody of her children, and plaintiff alleged that this was done without due process of law. It was the State's subsequent detention of the plaintiff's children which the Second Circuit found to be a public function. The Second Circuit reasoned that the state statute which authorized the state to take custody of the children and provide for their needs through different types of institutions, including private child care institutions, transformed the care of such children into a public function. In the first place, the validity of the *Perez* Court's reasoning that an activity can become a public function whenever a state chooses to take some responsibility for that activity is seriously in doubt. *Perez* was decided before this Court reiterated in *Jackson* that an activity must be traditionally and exclusively reserved to the State before it can be considered a public function. *See, Player* v. *State of Alabama Dept. of Pensions & Security*, 400 F. Supp. 249 (MD Ala. 1975), *aff'd* 536 F. 2d 1385 (5 Cir. 1976). In addition, the function under consideration in *Perez* — the involuntary detention of children — could indeed be construed as one of those few activities both traditionally and exclusively performed by the state, quite apart from any statutory delegation. Moreover, the activity challenged by the plaintiff in *Perez* — the detention of her children — was the exact activity which the Court found to be the public function. *Perez*, 479 F. 2d at 766. In this case, it is not the State's provision of special needs education which is being challenged, but, rather, the dismissal of teachers who chose to teach special needs children in a private school rather than a public school setting. Thus, contrary to petitioners' assertion that a finding of state action here would not require an extension beyond the limits sug-

gested in Perez,[21] a finding here that a private school's dismissal of its teachers constitutes state action would represent a significant extension of the public function concept into the " 'collateral aspect[s] of' " that function.[22] *Perez*, 499 F. 2d at 766, quoting *United States* v. *Wiseman*, 445 F.2d 792, 796 (2 Cir.) *cert. denied*, 404 U.S. 967 (1971). *Accord*, *McQueen* v. *Druker*, 428 F. 2d 781 (1 Cir. 1971).

Nor is there a conflict between the First Circuit's decision and the Ninth Circuit's opinion in *Ginn* v. *Matthews*, 533 F. 2d 477 (9 Cir. 1976). The *Ginn* Court held only that an ostensibly private community action agency which was organized to administer the programs of the Federal Office of Economic Opportunity could be charged with the responsibility of a state actor, at least where the federal government imposed numerous restrictions on that agency's operation, including restrictions on the agency's ability to dismiss employees, the activity which was challenged by the plaintiffs. That holding is inapplicable here because the facts of the two cases differ in at least two important respects. First, the respondent school was not organized for the sole purpose of administering a governmental program, as was the community action agency.[23] Secondly, in *Ginn*, federal regulations required a certain composition of the Headstart Policy Council, the body which had final authority over the hiring and firing of the agency's staff. Here, no governmental agency asserted any control what-

[21] Petitioners' Brief, p.44, fn.18.

[22] Note that the First and Second Circuits' limitation of the public function theory of state action to those cases where the very activity challenged is the public function is consistent with this Court's holding under other theories of state action that there must be a nexus between the activity challenged by the plaintiff and the state action.

[23] While the record itself is silent as to the history of the school, as the First Circuit noted, counsel for the school did indicate that the school was set up initially with private funds. *Klug*, 641 F. 2d at 17, fn. 1.

soever over the hiring and firing of school staff; those decisions were left solely to the discretion of the respondent school. Because of these differences between the two cases, a conflict cannot be considered to exist between the First and Ninth Circuits.

Petitioners have made the mistake of assuming that there must be a conflict in this area merely because the courts reach different results when considering the question of state action. However, "...this apparent disarray is to be expected since '[o]nly by sifting facts and weighing circumstances [of each case] can the non-obvious involvement of the state in private conduct be attributed its true significance.' " *Perez*, 479 F. 2d at 764, citing *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 722 (1961). As can be seen from the above discussion, the circuit courts do consistently apply the same tests when "sifting" and "weighing" these circumstances and therefore, there is no need for this Court to again articulate these same tests.

III. There Is No Conflict Between the Opinions of This Court and the Decision of the First Circuit.

Petitioners contend that there is a "conflict in principle" between the First Circuit's decision, and the opinions of this Court. As the above discussion makes clear, not only is there no conflict between this Court's decisions and the First Circuit's opinion, but the First Circuit in this case has carefully applied the settled principles of state action analysis which have been enunciated by this Court.

Petitioners' reference to *Norwood* v. *Harrison*, 413 U.S. 455 (1973) is misleading and, at best, irrelevant. The *Norwood* plaintiffs sued the state to enjoin the operation of a state program which purchased textbooks for children in private schools even if those schools engaged in racial discrimination. By providing this textbook aid, the *Norwood* Court found that

the state significantly aided the organization and continuation of a separate system of private, discriminatory schools. State action was not an issue in that case because the private schools were not named as parties to the suit. The appropriate case to consider the significance of motive versus effect in a state action analysis is *Evans* v. *Newton*. There, as the First Circuit noted, this Court looked to the motive for the city's delegation of its trustee duties over the park to private parties, and, finding that the city's purpose for the delegation was to evade constitutional requirements, then looked beyond the formal labeling of the park as private for other indicia of state involvement. Once the court found those other indicia of state involvement, the court found state action. The lesson of *Newton* is that courts may look behind a private entity to consider the presence of a discriminatory motive for its creation and then, if it so finds, look further for state "insinuation". "Should a public institution be placed in private hands with the actual purpose of evading constitutional requirements, the courts may look beyond the formal structure of the institution to find other indicia of state involvement". *Klug*, 641 F. 2d at 23. There is, therefore, no independent significance to motive other than as a triggering mechanism to allow the Court to look for state involvement behind an ostensibly private actor. *Accord*, *Gilmore* v. *City of Montgomery*, 417 U.S. 556 (1974). Here, both motive and effect correctly played no part in the First Circuit's analysis. The Court needed no threshold finding of discriminatory motive to look for state involvement in the respondent school.

Finally, petitioners argue that the First Circuit's opinion conflicts in principle with decisions of this Court on the question of standing. Again, this argument is irrelevant to the question at hand. Simply put, this case raises the question of whether respondents are proper defendants, not whether peti-

tioners would have been the proper plaintiffs to bring suit against a defendant who was acting under color of state law.[24] There is, therefore, no conflict, real, or in principle, between the decisions of this Court and the First Circuit.

Conclusion

The First Circuit correctly applied settled principles of this Court in carefully analyzing petitioners' state action claims. That Court gave little consideration to the public function doctrine, recognizing as this Court has, the doctrine's generally limited scope and inappropriate application to circumstances like those here.

The issue presented to the First Circuit was an important one. But that Court's holding was consistent with long standing precedents and principles of this Court and not in conflict with the analytical framework of the other circuits. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[24] When petitioners state that the First Circuit suggested that they lacked standing to challenge their dismissals on First Amendment grounds because they were not "intended beneficiaries of the service for which the state had contracted with the school" (641 F. 2d at 26), they confuse state action "standing" with first Amendment standing. The First Circuit was clearly addressing state action when it made this remark, suggesting a greater significance to "beneficiaries" making state action claims. Nothing in the lower Court's opinion remotely suggests that that Court took any position on First Amendment standing. The issue was not before the First Circuit and is not before this court. If it is to be addressed at all, it can only be after state action renders that Amendment applicable. See footnote 11 above.